

# Trade Union Ambivalence Toward Enforcement of Employment Standards as an Organizing Strategy

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*Trade unions in Australia have long played an important role in the enforcement of minimum employment standards. The legislative framework today continues to recognize this enforcement role, but in a way that is more individualistic and legalistic than in the past. At the same time that the law has evolved to emphasize the representation and servicing role of trade unions, the Australian union movement has sought to revitalize and grow through the adoption of an “organizing model” of unionism that emphasizes workplace-level activism. This Article explores how these seemingly opposing trends have manifested themselves in the enforcement-related activities of five trade unions. Considerable diversity was found among the unions in relation to the extent to which and how the unions performed enforcement-related activities. However, all five unions spent significant time and resources on monitoring and enforcing employer compliance with minimum standards and saw this work as a core part of what they do. The case studies suggest, however, that the way in which this work is undertaken within unions and by whom has changed significantly in recent decades. While there was evidence that enforcement work was used tactically by unions in certain cases, this was largely on an ad hoc basis and there was little indication that the enforcement work was integrated into broader organizing objectives and strategies. Overall, the unions were ambivalent, if not skeptical, as to the capacity for enforcement work to grow unions through building workplace activism and collective strength.*

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## INTRODUCTION

While the primary responsibility for monitoring and enforcing minimum employment standards rests with the state, it is widely recognized that trade unions can — and in many jurisdictions do — play an important role in supplementing state-based enforcement activity.<sup>1</sup> The potential benefits that trade unions can bring to compliance frameworks include greater capacity to monitor employer compliance with employment standards and to reach workers, as a result of their presence in workplaces; independence from employers; and expertise in workplace matters as well as the industries and sectors in which they operate.<sup>2</sup> Trade unions can play a role in assisting and supporting individual workers who may have the legal right to enforce their own entitlements, but who may not be aware of their rights or how to enforce them, find the costs associated with pursuing their claims through the courts prohibitive, or be reluctant to enforce their rights for fear of employer reprisal and retribution.<sup>3</sup> Unions can also play an important role in educating

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- 1 See, e.g., Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552 (2010); David Weil, *Individual Rights And Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 13 (Richard B Freeman, Joni Hersch & Lawrence Mischel eds., 2004); see also Trevor Colling, *What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights*, 35 INDUS. L.J. 140, 144-45 (2006); Brooke Lierman, "To Assure Safe and Healthful Working Conditions": Taking Lessons from Labor Unions to Fulfill OSHA's Promises, 12 LOYOLA J. PUB. INT. L. 1 (2010); Leah F. Vosko & Mark Thomas, *Confronting the Employment Standards Enforcement Gap: Exploring the Potential for Union Engagement with Employment Law in Ontario, Canada*, 56 J. INDUS. REL. 631 (2014); Linda Dickens, *Delivering Fairer Workplaces Through Statutory Rights? Enforcing Employment Rights in Britain*, Paper Presented at the 15th World Congress of the International Industrial Relations Association, Sydney, Austl. (Aug. 2009).
  - 2 Cynthia Estlund, *Rebuilding the Law of the Workplace in the Era of Self-Regulation*, 105 COLUM. L. REV. 319, 364 (2005); Fine & Gordon, *supra* note 1; Tess Hardy, *Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards*, 22 ECON. & LAB. REL. REV. 117, 121-24 (2011); Weil, *supra* note 1.
  - 3 See Chris Arup & Carolyn Sutherland, *The Recovery of Wages: Legal Services and Access to Justice*, 35 MONASH U. L. REV. 96 (2009); Margaret Lee, *Regulating Enforcement of Workers' Entitlements in Australia: The New Dimension of Individualisation in Australia*, 17 LAB. & INDUSTRY 41 (2006); Miles Goodwin

both workers and employers as to their obligations under labor laws.<sup>4</sup> The enforcement roles performed by unions may benefit not only those workers who rely on these minimum employment standards, but also the integrity of the regime of labor regulation and its capacity to achieve broader social objectives such as the promotion of fairness in the labor market.<sup>5</sup>

It is also the case, of course, that trade unions have a number of distinct roles and objectives that go beyond assisting members secure minimum employment standards through the provision of legal advice and representation. These include, for example, roles in rule-making (through collective bargaining and legislation), and in the development, administration and delivery of government policy.<sup>6</sup> Unions also have organizational objectives which, while they may vary according to such factors as size, industry, growth strategies, leadership, and political orientation, invariably extend well beyond delivering legal services to members.

In performing these roles and pursuing these objectives, trade unions operate under a set of increasingly serious internal and external constraints. These include resource constraints arising from a sustained decline in membership and correspondingly in power and influence, and (in many jurisdictions) the challenges associated with operating within an increasingly individualized and legalistic environment. All these considerations raise questions over the extent to which unions are willing and able to perform enforcement-related roles that are or may be assigned to them under legislative frameworks.

This Article examines the extent to which and how the “service” role of trade unions — more specifically their role in assisting workers enforce minimum employment standards — has evolved and how it fits with, and is used as a means of achieving, the broader union objective of recruiting new

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& Glenda Maconachie, *Victimisation, Inspection and Workers’ Entitlements: Lessons Not Learnt?*, Paper Presented at the Asia-Pacific Economic and Business History Conference, Melbourne, Austl. (Feb. 13-15, 2008).

4 Weil, *supra* note 1, at 14. Studies in the United Kingdom have found that union members are much more likely than nonmembers to be aware of their employment rights. See, e.g., Jo Casebourne, Jo Regan, Fiona Neathey & Siobhan Tuohy, *Employment Rights at Work: Survey of Employees 2005* (Inst. of Emp’t Studies, London: Dep’t of Trade & Industry, Emp’t Relations Research Series, Working Paper, 2006).

5 Peter Sheldon & Michael Quinlan, *Minimum Labour Standards and Their Enforcement*, 22 *ECON. & L. REL. REV.* 1 (2011).

6 Keith Ewing, *The Function of Trade Unions*, 34 *INDUS. L.J.* 1, 3 (2005) (identifying five functions of trade unions, which overlap to some extent: a service function, a representation function, a regulatory function, a government function, and a public administration function).

members. It focuses on Australia, where unions have long played a significant role in the monitoring and enforcement of minimum labor standards, and where the union movement has in recent decades engaged in a concerted attempt to revitalize and grow through the adoption of an “organizing model” of unionism. The Article is based on case-study research into the enforcement practices of five branch-level trade unions in Australia. Our research revealed considerable diversity among unions in relation to the extent to which and how they performed these types of activities. However all five unions continued to spend significant time and resources on monitoring and enforcing employer compliance with minimum standards and to see this work as a key union function. While we found some evidence of enforcement work being used tactically, this was largely on an ad hoc basis and there was little indication that unions had integrated their enforcement work into broader organizing objectives and strategies. Overall, the unions were ambivalent, if not skeptical, as to the capacity for enforcement work to grow unions through building workplace activism and collective strength.

In examining these issues, this Article seeks to make a modest contribution to three broad strands of existing scholarship. First, as noted above, there is now a significant body of literature, largely from the legal and regulatory disciplines, emphasizing the positive role that unions can play in supplementing state-based regulation of the labor market.<sup>7</sup> However, there is relatively little empirical consideration of the extent to which unions are willing to undertake these roles or how they do so. Yet, as Trevor Colling reminds us, “[p]roposals to make employment rights effective must be informed by an understanding of changing union roles.”<sup>8</sup> There is also little consideration of how the enforcement-related roles of unions are influenced and shaped by, and may differ according to, national legislative and strategic contexts.

Second, it has been suggested that the adoption by trade unions of a more active role in enforcing minimum labor standards may potentially help counter their ongoing decline in membership and influence, through providing a direct and tangible means of demonstrating their value to members and potential members, as well as to society more broadly.<sup>9</sup> To date, however, there has been little consideration of the extent to which such a view is consistent with

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7 See sources cited *supra* note 1.

8 Trevor Colling, *Trade Union Roles in Making Employment Rights Effective*, in *MAKING ENFORCEMENT RIGHTS EFFECTIVE: ISSUES OF ENFORCEMENT AND COMPLIANCE* 183, 183 (Linda Dickens ed., 2012).

9 Tess Hardy & John Howe, *Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia*, 22 *AUSTRALIAN J. LAB. L.* 306 (2009); Vosko & Thomas, *supra* note 1, at 646.

how trade unions perceive their role and functions, or the extent to which such roles fit within unions' own strategies for revitalization and renewal.

The third area of inquiry that this Article draws upon, and seeks to contribute to, is the small body of literature, emanating largely from the United States and the United Kingdom, which has sought to understand how unions engage with, and use, the law.<sup>10</sup> Of particular relevance for this study is work carried out by Colling examining the extent to which British trade unions engage in “legal mobilization,” a tactical approach through which individual employment law is used for broader objectives, including to recruit members and advance collective interests.<sup>11</sup>

This Article is structured as follows. Part I provides the legal, institutional and theoretical background for the study. It starts with an overview of the legal and strategic contexts in which trade unions carry out their enforcement-related activities. It focuses first on the evolution of the legal framework under which unions are assigned, and carry out, enforcement-related roles and functions. It then turns to considering the evolution of union strategy in Australia, focusing on the shift within recent decades towards an “organizing model” and how enforcement-related activities are understood to fit within this model of unionism. Section I.C. explores the “legal mobilization” thesis, which is the theoretical framework drawn upon in this Article. Part II of the Article draws upon empirical research we conducted to consider the extent to which unions continue to perform enforcement-related activities and the extent to which they consider and use enforcement of employment standards as a mobilization strategy to achieve the broader organizational objective of organizing workers. We draw together our findings and offer some concluding observations in the last Part.

## I. LEGAL, INSTITUTIONAL AND THEORETICAL BACKGROUND

### A. Evolving Legal Frameworks

In Australia, trade unions have historically performed a significant, if not preeminent, role in the monitoring and enforcement of minimum labor

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10 In the United States, see, for example, Weil, *supra* note 1; and Estlund, *supra* note 2.

11 Colling, *supra* note 1, at 147; see also Colling, *supra* note 8; Trevor Colling, *Court in a Trap? Legal Mobilization by Trade Unions in the United Kingdom* (Warwick Papers in Industrial Relations, Working Paper, 2009), [https://www2.warwick.ac.uk/fac/soc/wbs/research/irru/wp/irru\\_wp\\_91.pdf](https://www2.warwick.ac.uk/fac/soc/wbs/research/irru/wp/irru_wp_91.pdf).

standards.<sup>12</sup> This important aspect of unions' regulatory function has historically been supported by Australia's industrial law framework, in particular the federal conciliation and arbitration system that operated for much of the twentieth century. Under this system, trade unions played a very significant role in both setting standards and monitoring and enforcing compliance with them through awards. Unions enjoyed a range of legal supports for their enforcement activities, including rights of entry (originally arising under terms of awards and later through statute),<sup>13</sup> and standing to seek recovery of wages and penalties for breaches of minimum standards of employment in awards in the courts.<sup>14</sup>

The shift in the early 1990s away from a system of labor regulation based on conciliation and arbitration and awards to one based on enterprise bargaining diminished the relative importance of awards and, correspondingly, the regulatory role of unions. At the same time, the increasing emphasis given to other means of setting minimum standards of employment, including enterprise bargaining, has presented further challenges to the enforcement capacity of unions. This includes through the potential for union involvement in these processes to soak up union resources and detract from monitoring and enforcement functions. In 1996, the *Workplace Relations Act 1996* (Workplace Relations Act) placed restrictions on the capacity of the federal industrial tribunal to resolve disputes, thus further reducing "the capacity of trade unions to utilize the tribunal as a more informal mechanism of enforcement . . . ."<sup>15</sup>

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12 BREEN CREIGHTON & ANDREW STEWART, *LABOUR LAW* 499-502 (5th ed. 2010); Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, 136 QUEENSLAND U. TECH. L.J. (1994); Hardy & Howe, *supra* note 9; Lee, *supra* note 3; Miles Goodwin, *The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia* 163-64 (Mar. 2003) (unpublished Ph.D. Dissertation, Sch. of Industrial Relations and Organisational Behaviour, Univ. of New South Wales); Glenda Maconachie & Miles Goodwin, *Enforcing Minimum Labour Standards in Australia from 2010: Correcting or Compounding Problems?*, Proceedings of the 23rd Conference of the Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ), Newcastle City Hall (Feb. 4-6, 2009).

13 William Ford, *Being There: Changing Union Rights of Entry Under Federal Industrial Law*, 13 AUSTRALIAN J. LAB. L. 1 (2000); Hardy & Howe, *supra* note 9, at 315; Lee, *supra* note 3, at 48; Goodwin, *supra* note 12.

14 *Conciliation and Arbitration Act 1904* (Cth) s. 42A. See Hardy & Howe, *supra* note 9, at 316.

15 Hardy & Howe, *supra* note 9, at 319; see *Workplace Relations Act 1996* (Cth).

These trends were further consolidated through the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices Act).<sup>16</sup>

Historically, the prominence of unions in enforcing standards in Australia is also partly attributable to the existence of a relatively underdeveloped federal state inspectorate.<sup>17</sup> The 1990s, however, saw the beginning of a significant shift in the relative functions and powers of the federal government labor inspectorate and trade unions.<sup>18</sup> Under the Workplace Relations Act, the former Coalition Government established a number of state agencies with responsibility for monitoring and enforcing various aspects of the new labor relations system.<sup>19</sup> Following the passage of the Work Choices Act in 2005, the powers and resources of the federal labor inspectorate were substantially augmented, and it began to adopt a more active enforcement approach.

Today, while the federal state inspectorate has been renamed the Fair Work Ombudsman (FWO) under the Labor Government's *Fair Work Act 2009*, and its emphasis has been somewhat reoriented towards the promotion of "harmonious, productive and cooperative workplace relations,"<sup>20</sup> the inspectorate has maintained similar focus and functions to its predecessor

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16 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth); Anthony Forsyth, *Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission*, 32 AUSTRALIAN BULL. LAB. 27 (2006); Hardy & Howe, *supra* note 9, at 320-21.

17 The first federal labor inspector was not appointed until the early 1930s and the inspectorate was generally under-resourced and of limited effectiveness until the 1990s. Miles Goodwin & Glenda Maconachie, *Employer Evasion of Workers' Entitlements 1986-1995: What and Whose?*, in *REWORKING WORK* 239 (Marian Baird, Rae Cooper & Mark Westcott eds., 2005); Hardy & Howe, *supra* note 9.

18 For a detailed discussion of the development of the federal labor inspectorate and the shift in the balance between union and state enforcement, see Hardy & Howe, *supra* note 9. See also Tess Hardy, John Howe & Sean Cooney, *Mandate, Discretion and Professionalisation in an Employment Standards Enforcement Agency: An Antipodean Experience*, 35 LAW & POL'Y 81 (2012).

19 These included the Office of Workplace Services, the Office of the Employment Advocate and the Australian Building and Construction Commission. The focus of several of the new state agencies (at least the two latter) was firmly on enforcing those provisions of the Work Relations Act that promoted statutory individual agreements (referred to as Australian Workplace Agreements or AWAs), and that restricted the roles and functions of trade unions. This politicization of the state inspectorate under the former Coalition Government, as well as the ongoing role of the inspectorates in prosecuting unions for breaches of workplace laws, continues to influence the nature and dynamics of the relationships between the current federal state inspectorate and trade unions.

20 *Fair Work Act 2009* (Cth) s 682.

agencies. It has continued to enjoy significant enforcement powers and to be relatively well-resourced, although government funding has started to contract in recent years.<sup>21</sup> The significant empowerment of the state inspectorate since the 1990s, along with the imposition of significant restrictions on unions' regulatory functions (outlined further below), has led some commentators to suggest that unions have gone from being "partners in enforcement" with the government inspectorate prior to the 1990s, to becoming "the junior partner."<sup>22</sup>

The increasing individualization of Australia's labor relations framework since the 1990s is also relevant to understanding the enforcement role of unions in Australia today.<sup>23</sup> Recent years have seen an increase in statutory regulation of individual employment rights, with "legal rights being granted to individuals with an accompanying capacity to enforce those rights through legal action."<sup>24</sup> This trend commenced with the legislative entrenchment in the Workplace Relations Act, as amended by the Work Choices Act, of a core set of minimum employment standards. These standards are known as the Australian Fair Pay and Conditions Standard and have been consolidated by the Fair Work Act through the establishment of ten National Employment Standards (NES) and modern awards.<sup>25</sup> Australian labor law has also become more individualized in the manner in which employment standards are enforced.<sup>26</sup> Prior to the 1990s, the task of enforcing awards was largely left to the unions.<sup>27</sup>

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21 Goodwin & Maconachie, *supra* note 17; Hardy & Howe, *supra* note 9.

22 Hardy & Howe, *supra* note 9, at 306.

23 STEPHEN DEERY & RICHARD MITCHELL, *EMPLOYMENT RELATIONS: INDIVIDUALISATION AND UNION EXCLUSION — AN INTERNATIONAL STUDY* (1999). In a recent article, which provides a more sophisticated typology of individualism and collectivism in Australian labor relations, Mark Bray and Joanna MacNeill observe that individualism (or collectivism) can be found in at least three dimensions of employment relations: the *rules* of the employment relationship; the social processes for the *making* of these rules; and the social processes for the *enforcement* of these rules. The first and third of these dimensions are particularly relevant for our purposes. Mark Bray & Joanna MacNeill, *Individualism, Collectivism and the Case of Awards in Australia*, 53 J. INDUS. REL. 149 (2011). This trend is by no means limited to Australia: for example, the Organisation for Economic Development (OECD) has noted a shift in the dominant source of regulation away from voluntary self-regulation at the collective level to formal individual rights enforced through the courts. See OECD, *OECD EMPLOYMENT OUTLOOK* 2012, at 144-45 (2012).

24 Bray & MacNeil *supra* note 23, at 151.

25 *Fair Work Act* pts. 2-2, 2-3.

26 Bray & MacNeill, *supra* note 23.

27 Until 1990 an individual employee who was not a union member did not have the right to pursue legal action to enforce federal award provisions. *Id.* at 157.

Under the Workplace Relations Act and the Work Choices Act, enforcement of provisions in legislation and awards became increasingly individualistic in nature.<sup>28</sup>

Today, the Fair Work Act provides individuals with the capacity to enforce their own legal rights under agreements and modern awards. It has also expanded the small claims jurisdiction (a quicker, easier and more informal avenue through which to pursue claims within the court system),<sup>29</sup> and made available a wider range of civil remedies (such as orders, injunctions, compensation and reinstatement). The Act also recognizes the role that unions play in enforcement of minimum employment standards. However, in most cases these rights afforded to unions to enforce the rules are rights to enforce the rules *on behalf of* individual employees.<sup>30</sup> A union can apply for an order in relation to a contravention or proposed contravention of a civil remedy provision if the employee is affected by the contravention and the union is entitled to represent the industrial interests of the employee.<sup>31</sup> If the contravention relates to a workplace agreement or workplace determination covering the union, the union can also make an application in its own right and/or on behalf of an employee.<sup>32</sup> While parties are generally prevented from recovering costs in enforcement proceedings,<sup>33</sup> penalties may be ordered for breach of the relevant provisions and parties (including unions) may seek for any applicable penalty to be paid to themselves rather than into consolidated revenue. There are also several industry-specific regulatory schemes in Australia in which trade unions play an important part in setting, and monitoring compliance

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An amendment to the *Industrial Relations Act 1988* (Cth) in 1990 explicitly permitted employees who were not party to an award to bring enforcement proceedings.

28 Bray & MacNeill, *supra* note 23, at 159-60; Hardy & Howe, *supra* note 9, at 2.

29 The monetary limit for small claims has been increased to AU\$20,000 and the small claims jurisdiction has been conferred on the Federal Circuit Court as well as State and Territory Courts. *Fair Work Act* s 548.

30 Bray & MacNeill, *supra* note 23.

31 *Fair Work Act* s 540(2). Whether or not a union is entitled to represent the industrial interests of an employee is determined according to the membership eligibility requirements of the union's rules. These rules (including the requirement for them to include conditions of eligibility) are regulated by the *Fair Work (Registered Organisations) Act 2009* (Cth). While not discussed further here, it should be noted that the Fair Work Act also provides unions, for the first time, with the capacity to bring actions in the area of antidiscrimination through an expanded general protections regime.

32 *Fair Work Act* s 540.

33 *Id.* s 570.

with, minimum standards. These include those operating within the transport industry<sup>34</sup> and the textile clothing and footwear industry.<sup>35</sup>

## B. Evolving Union Strategies

We have outlined the legal framework under which Australian trade unions perform compliance-related work. The existence of various roles and rights under statute, however, tells us little about the extent to which, and how, these powers are used by trade unions and for what purposes and with what effect. To further understand these issues, we submit, it is necessary to examine the shift within the Australian union movement towards an organizing model of unionism. It is also necessary to consider how “service-related” activities of unions — and enforcement-related activities more specifically — fit within this theoretical model.

Since the early 1990s, the Australian union movement has sought to respond to the decline in union density and power by moving towards an “organizing” model of unionism. Prior to this time, under “the Australian unions’ variant of the ‘servicing’ model of unionism,”<sup>36</sup> trade unions relied heavily on institutional support from governments and industrial tribunals. They also delivered for their members largely through securing strategic gains by means of legal argument before tribunals and the extension of these wins by means of the strong arbitral power of these tribunals to other worksites.<sup>37</sup> This approach, under which workplace power was “useful but not essential,”<sup>38</sup>

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34 See Sarah Kaine & Michael Rawling, “Comprehensive Campaigning” in the NSW Transport Industry: Bridging the Divide Between Regulation and Union Organizing, 52 J. INDUS. REL. 183 (2010).

35 See Karin Lukas, *Human Rights in the Supply Chain: Influence and Accountability*, in UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION 151 (Radu Mares ed., 2012); Shelley Marshall, *Australian Textile, Clothing and Footwear Supply Chain Regulation*, in HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION 555 (Colin Fenwick & Tonia Novitz eds., 2010); Igor Nossar, Richard Johnstone & Michael Quinlan, *Regulating Supply Chains to Address the Occupational Health and Safety problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia*, 17 AUSTRALIAN J. LAB. L. 137 (2004).

36 David Peetz, Barbara Pocock & Chris Houghton, *Organizers’ Roles Transformed? Australian Union Organizers and Changing Union Strategy*, 49 J. INDUS. REL. 151, 152 (2007).

37 David Peetz & Janis Bailey, *Dancing Alone: The Australian Union Movement over Three Decades*, 54 J. INDUS. REL. 525 (2012).

38 *Id.* at 527.

became increasingly untenable in the 1980s and early 1990s when unions in Australia (like many of their counterparts overseas) found themselves faced with a raft of external and internal challenges. These included increasing state and employer hostility, structural changes in the labor market, the shift towards enterprise-level bargaining, a significant and sustained decline in union density, and a crisis in organizational and workplace resources.<sup>39</sup>

In response to this perceived crisis, the sole peak union body in Australia, the Australian Council of Trade Unions (ACTU), and others argued that if unions were to survive and grow, they needed to become less reliant on institutional structures. It was argued that unions should instead redirect their resources towards building organizational power in workplaces and industries.<sup>40</sup> In embracing the organizing model and in the delivery of relevant training, Australian unions were inspired and influenced by North American models.<sup>41</sup> The embracement of an organizing model of unionism by the ACTU led in 1994 to the establishment of Organizing Works — a program designed to build the organizing capacity of affiliates through training young union organizers.

There is “no single account of what constitutes the organising model,”<sup>42</sup> and the concept is “clouded with conceptual and practical problems in its operationalisation.”<sup>43</sup> Moreover, it has been observed that the organizing approach in Australia, while influenced by overseas models, has diverged from and adapted these models.<sup>44</sup> For our purposes, however, it suffices to note that commonly identified elements or dimensions of an organizing approach include an increased emphasis on growth (that is, the recruitment of new

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39 Peetz, Pocock & Houghton, *supra* note 36, at 152-53; Peetz & Bailey, *supra* note 37, at 531.

40 ACTU, SUMMARY REPORT: UNITED STATES MISSION ON RECRUITMENT AND ORGANISATION (1993) (Austl.); ACTU, UNIONS@WORK: THE CHALLENGE FOR UNIONS IN CREATING A JUST AND FAIR SOCIETY (1999) (Austl.); Rae Cooper, *Peak Council Organizing at Work: ACTU Strategy 1994-2000*, 14 LAB. & INDUSTRY 1 (2003). It should be noted that key features of the organizing model, such as the emphasis on activist workplace delegate structures, were not necessarily new to a number of unions which had traditionally had activist models of unionism. MICHAEL CROSBY, POWER AT WORK: REBUILDING THE AUSTRALIAN UNION MOVEMENT 77-78 (2005); Peetz, Pocock & Houghton, *supra* note 36, at 154.

41 Brendan Carter & Rae Cooper, *The Organising Model and the Management of Change: A Comparative Study of Unions in Australia and Britain*, 57 RELATIONS INDUSTRIELLES 712 (2002).

42 *Id.* at 713.

43 Rosaria Burchielli & Timothy Bartram, *What Helps Organizing Work? The Indicators and the Facilitators of Organizing*, 51 J. INDUS. REL. 687, 689 (2009).

44 Peetz, Pocock & Houghton, *supra* note 36, at 152.

members), as well as on the active involvement or mobilization of members and delegates in union activities (member activism).<sup>45</sup>

The organizing model is often contrasted to a “servicing” approach to unionism, which is characterized by a transactional relationship between the union and its members whereby union officials deliver services and, in exchange, union members pay dues. This servicing approach to unionism often involves the use of legalistic tactics that are removed from workplaces.<sup>46</sup> The organizing model is also often associated with broader efforts to promote collective identities among workforces and to recreate labor as a social and political movement.<sup>47</sup> Additional features of an organizing model of unionism may include efforts to broaden union constituencies through attracting new categories of workers; to extend membership downwards to low-wage workers in secondary labor markets; and to develop broad alliances and campaigns across national borders.<sup>48</sup>

In Australia, the transition to an organizing approach began in the early 1990s. However, its adoption has been complex and uneven both across and within unions and, as a previous study reminds us, “it would be a mistake to see all unions as on a single path, following a uniform strategy.”<sup>49</sup> It is also important to note that accounts of an organizing model of unionism are often normative — a model for rebuilding the union movement — rather than a descriptive account of how things work. Nonetheless, there is no doubt that there has been “a general strategic shift towards greater union organizing especially through the contribution of active members and delegates”<sup>50</sup> in the Australian union movement. There is also no doubt that this shift has been felt across the left and right factional divides,<sup>51</sup> and that the approach has been, and continues to be, actively encouraged and supported by the ACTU.

Under an organizing model of unionism, enforcement-related activity is seen as an essential task of a union, but not as a principal or effective means of recruiting new members. This is largely because enforcement-related activity is almost always individual in nature, and so it is perceived as inconsistent

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45 *Id.*; Rae Cooper, *Getting Organised? A White Collar Union Response to Membership Crisis*, 43 J. INDUS. REL. 422 (2001).

46 Carter & Cooper, *supra* note 41, at 713.

47 Edmund Heery, Melanie Simms, Dave Simpson, Rick Delbridge & John Salmon, *Organizing Unionism Comes to the UK*, 22 EMP. REL. 38, 39 (2000).

48 Burchielli & Batram, *supra* note 43.

49 Peetz, Pocock & Houghton, *supra* note 36, at 155; *see also* Carter & Cooper, *supra* note 41.

50 Peetz, Pocock & Houghton, *supra* note 36, at 155.

51 Peetz & Bailey, *supra* note 37, at 534.

with the collective nature of union activity.<sup>52</sup> A former director of the ACTU Organizing Works program provides further insight into the way in which enforcement-related work is seen to “fit” within an organizing theory of unionism. In his publication entitled *Power at Work: Rebuilding the Australian Union Movement*, Michael Crosby acknowledges that members “were much happier and more favourably disposed to the union if their grievance was settled in their favour.”<sup>53</sup> However, he argues that a number of considerations militate against the embracement of an “insurance model of unionism” as a means of building Australian unions. These include the individual nature of most grievances,<sup>54</sup> the fact that most workers will not have a grievance during their working life and so do not need a union solely for this purpose, and the increasing restrictions imposed by law on the capacity of unions to have workers’ grievances addressed quickly and easily through the industrial tribunal.<sup>55</sup>

According to the organizing model, unions must continue to perform compliance-related work, but this work should not be performed overwhelmingly or even to a large part by organizers. Proponents of an organizing approach identify a number of strategies that can be used to deal with grievances in “the quickest and most efficient manner possible,” while freeing up organizers to organize members collectively.<sup>56</sup> This includes being selective about what issues to take up; the “batching of grievances” (in which union officials arrange to sit down with an employer’s human resource department on a regular basis to deal with a large number of cases at a time); getting outside help with grievances (including possibly by relevant government departments or agencies and labor law firms); and the use of call centers (a specific function or unit within the union that receives and transmits communications from members and potential members). This latter tactic, described by Crosby as “the most powerful,” has the potential to facilitate prompt and efficient response to member’s concerns and queries, enabling the union to track the efficiency with which member concerns are handled, while also effectively diverting the bulk of member queries from organizers.<sup>57</sup>

There are, however, certain circumstances in which compliance-related activities are accorded greater significance due to their organizing potential. This involves situations where the pursuit of a compliance-related issue initially

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52 CROSBY, *supra* note 40, at 106.

53 *Id.* at 80.

54 *Id.* at 81.

55 *Id.* at 83.

56 *Id.*

57 *Id.* at 113-14.

of only one member may be used as a basis for a campaign that affects a wider group of workers and so provide the catalyst for collective action. Crosby explains: “If an individual issue has wide ramifications for a larger group of members, then it can be pursued collectively and the union’s strength built in consequence . . . .”<sup>58</sup> It may also be the case that enforcement-related activity is used as a single tactic within a broader range of tactics. For some unions, this integration of enforcement-related activity into broader campaigns is achieved through “comprehensive campaigning,” by which unions use “a combination of industrial, organizational, community and political activities in pursuit of an articulated strategic goal.”<sup>59</sup>

### C. Legal Mobilization Theory

As noted in our Introduction, one of the objectives of this Article is to draw on our case studies to explore the extent to which Australian unions have engaged in “legal mobilization,” whereby individual employment law is used strategically to achieve goals such as recruitment of members and advancement of collective interests. Specifically, our interest is in Australian unions’ use of enforcement of employment standards as an organizing strategy. Drawing upon earlier work from the United States and the United Kingdom,<sup>60</sup> Colling observes that unions’ use of individual statutory employment law has the potential to be a stage in unions’ recruitment of workers and the achievement of union recognition: “Recognising unions’ expertise in individual representation (exercised perhaps through the right to be accompanied at disciplinary hearings), workers might come to desire collective voice in information and consultation, which in turn might eventually result in demand for full collective bargaining rights.”<sup>61</sup> Colling suggests that union use of the law is most likely to serve union objectives where it generates *inspirational effects* and/or *radiating effects*. *Inspirational effects* are those “confirming and consolidating of a sense of shared grievance or aspiration among a group of

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58 *Id.* at 106.

59 Kaine & Rawling, *supra* note 34, at 184.

60 In the United States, see, for example, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); and Holly J. McCammon, *Labor’s Legal Mobilization: Why and When Do Workers File Unfair Labor Practices?*, 28 WORK AND OCCUPATIONS 143 (2001). In the United Kingdom, Colling cites JOHN KELLY, *RETHINKING INDUSTRIAL RELATIONS, MOBILIZATION, COLLECTIVISM AND LONG WAGES* (1998); and Keith Ewing, *Trade Union Recognition — A Framework for Discussion*, 19 INDUS. L.J. 209 (1990).

61 Colling, *supra* note 11, at 4.

workers and providing a belief that this can be pursued successfully,”<sup>62</sup> and *radiating effects* are those that may extend beyond the specific case to change behavior by employers and/or trade union members. These effects, however, are only likely to be achieved where unions are able to successfully combine legal action with organizing resources.

While Colling’s work is concerned with similar issues to those examined in this Article, the broader scope of his inquiry (on engagement by unions with the law more broadly), in addition to the differing legal frameworks and historical and institutional contexts in which Australian unions operate, raises questions over the extent to which these types of findings may be relevant and applicable to the Australian context. Nevertheless, it seems logical to us that unions might see their enforcement activity as, at the very least, a stage in the recruitment of members. In the next Part, we draw on our empirical findings to discuss whether this assumption is correct.

## II. ENFORCING AND ORGANIZING IN AUSTRALIAN UNIONS

To explore the extent to which, and how, Australian unions integrate their enforcement-related activities into broader organizing objectives, we draw on evidence that was gathered in 2012 and 2013 as part of a broader study seeking to empirically examine the extent to which and how trade unions in Australia monitor and enforce minimum employment standards concerning wages, hours of work and leave.<sup>63</sup> We draw upon the “legal mobilization” concept introduced earlier in the Article to consider the extent to which these enforcement-related activities appear to be influenced by the strategic shift within the union movement towards the organizing model. The study consisted of qualitative case studies of five state branches of national trade unions, involving in-depth, semi-structured interviews with elected officials, industrial/legal officers and organizers in each union, as well as analysis of relevant material provided by the unions.<sup>64</sup> The case studies were undertaken on the condition of anonymity. The five participant unions covered a broad range of industries, both blue-collar and white-collar, mostly but not exclusively

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62 *Id.*

63 For the preliminary findings of this study, see INGRID LANDAU, SEAN COONEY, TESS HARDY & JOHN HOWE, *CTR. FOR EMP’T & LABOUR RELATIONS LAW, TRADE UNIONS AND THE ENFORCEMENT OF MINIMUM EMPLOYMENT STANDARDS IN AUSTRALIA, RESEARCH REPORT (2014)* (Austl.).

64 This study was funded by the Social Justice Initiative at the University of Melbourne.

in the private sector. The unions ranged in size from those with a branch membership of several thousand to among the largest unions in Australia.

### **A. An Overview of Compliance-related Activities**

Our interviews confirmed that the task of securing compliance by employers with minimum conditions of employment continues to constitute a critically important function of Australian trade unions, and to take up a significant proportion of unions' time and resources. Various interviewees, for example, described the task of monitoring and enforcing compliance by employers as "a core part of what unions are about"<sup>65</sup> and as "bread and butter work for unions."<sup>66</sup> This work was seen as an integral part of the benefits offered by a union to its members, with interviewees from all five unions emphasizing that they would assist members who had concerns that they were being underpaid or otherwise denied a lawful entitlement by their employer. It was emphasized that if unions were not to perform compliance-related work for their members (but rather to refer members to the state inspectorate), the members would question why they were paying union dues.<sup>67</sup> All unions studied also actively promoted legal services to members as a benefit of membership (through, for example, union newsletters and online material). It was also pointed out that the interests of the union in enforcing minimum standards lay both in ensuring that members received their legal entitlements, and in protecting their members' wages and conditions through ensuring that those employers who complied with their legal obligations were not put at a competitive disadvantage by noncompliant employers.<sup>68</sup>

We found significant variation among the case-study unions, however, with respect to the extent to which the interviewees felt their union focused on enforcement-related work relative to other common functions of unions such as organizing and bargaining. While two of the five unions noted that compliance-related work constituted a very significant, if not the majority, of their unions' time and resources, the other three unions noted that their union was much more focused on organizing and bargaining. The relative

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65 Interview with Industrial/Legal Officer, Union 4, in Melbourne, Austl. (Feb. 26, 2013).

66 Interview with Elected Officer, Union 1, in Melbourne, Austl. (Sept. 17, 2012).

67 Interview with Elected Officer, Union 4, in Melbourne, Austl. (June 26, 2013); Interview with Industrial/Legal Officer, Union 1, in Melbourne, Austl. (Oct. 8, 2012).

68 Interview with Industrial/Legal Officer, Union 3, in Sydney, Austl. (Nov. 26, 2012).

emphasis placed on compliance work would appear to be attributable to three main factors: levels of perceived noncompliance in the relevant industry, the nature of the union's membership, and union strategy. The two unions in which interviewees described compliance-related work as being widespread ("rampant"<sup>69</sup> and "endemic"<sup>70</sup>) and taking up a great deal of the union's time and resources represented workers in industries widely recognized to have very high levels of noncompliance with minimum labor standards relative to other industries and high proportions of vulnerable groups of workers. These two unions also appeared to have adopted strategies for growth which involved the promotion of the unions to members and potential members on the basis of their capacity to assist workers in enforcing their rights.

While all five case-study unions continued to undertake a significant amount of compliance-related work on behalf of members, interviewees confirmed that the *nature* of this compliance-related work had changed significantly in recent decades. In this respect, the interviews confirmed the impact of a number of the developments discussed in Section I.A. of this Article, whereby the enforcement-related activities of trade unions have increasingly been channeled through statutory mechanisms that are restrictive, individualistic and legalistic in nature. Interviewees observed that trade unions were facing a declining capacity to enforce minimum standards, and this was attributed to the increase in the legal restrictions on the capacity of unions to enforce rules informally at the workplace (through such mechanisms as "no ticket no start" and industrial action), as well as to a significant decline in membership and resources. It was also noted that parties and their representatives were increasingly less likely to make efforts to resolve disputes informally through negotiation and more likely to seek legal representation.

Overall, interviewees described union compliance-related work as being increasingly legalistic, expensive, complex and bureaucratic. As one organizer who had worked in the union movement for over fifteen years observed, "[I]t's harder now . . . You've got to box smarter. Gone are the days where you could turn around and say, 'There's been an underpayment,' or 'You've done the wrong thing, and we're going to sit everybody in the lunch sheds until you fix it' . . ." <sup>71</sup> An elected officer in another union explained, "I reckon looking at it over the years that it has got more difficult to recover people's entitlements, because you used to have more scope to go to the Industrial

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69 *Id.*; Interview with Elected Officer, Union 2, in Melbourne, Austl. (Oct. 17, 2012); Interview with Organizer, Union 2, in Melbourne, Austl. (Oct. 30, 2012).

70 Interview with Industrial/Legal Officer, Union 2, in Melbourne, Austl. (Oct. 17, 2012).

71 Interview with Organizer, Union 1, in Melbourne, Austl. (Nov. 13, 2012).

Relations Commission and not get bogged down in jurisdictional arguments than you do today.”<sup>72</sup> It was also widely noted that the trend toward juridification of compliance activity had compelled unions to engage more employees with legal training, and to institute a sharper division of labor between organizers and industrial and legal staff.

Most of the unions involved in our research had adopted structures and organizational practices in which the enforcement and organizing functions of the union were separated, although to varying degrees. As outlined in Section I.B. above, under an organizing model of unionism, organizers should be “freed” from much of the service-related work so that they can focus on building workplace activism. There are a number of strategies that unions can put in place to achieve this objective, such as the “batching of grievances,” referring complaints to government departments or agencies, and the use of call centers to service member enquiries. Empirical studies conducted by other scholars have found that a number of Australian unions have, in the process of moving to an organizing model, adopted these types of initiatives.<sup>73</sup> Our study found that some unions had separated their compliance-related functions from organizing. Union 4, for example, had a separate department and call center devoted to enforcing members’ rights, and in Unions 3 and 5 there were separate units that carried out the legal and industrial work associated with enforcement. A union official in Union 2 expressed the view that the union would have staff fully devoted to the service-related work if resources permitted. In those unions that had separated the enforcement and organizing functions, interviewees identified a number of rationales for this delineation. Only one union directly attributed the organizational restructuring to the “organizing principle of the union.”<sup>74</sup> Unions also identified other rationales for delineating the two functions: ensuring that all compliance-related requests for assistance were effectively addressed; coping with the significant body of work the enforcement function created; and in recognition of the differing expertise and skills needed by staff in this area (such as accounting skills in determining the existence and quantum of any underpayment).

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72 Interview with Elected Officer, Union 1, *supra* note 66.

73 *See, e.g.*, Carter & Cooper, *supra* note 41 (observing that the decision by the Community and Public Sector Union’s New South Wales Branch to separate the servicing and organizing functions of staff in the late 1990s encountered some difficulties. This included resistance from some officials, and the fact that many organizers continued to struggle with high workloads given their desire to continue to assist members with grievances, and the fact that previous practices of the union had created high member expectations with respect to union services in this area.).

74 Interview with Industrial/Legal Officer, Union 4, *supra* note 65.

In four of our five case-study unions, however, organizers continued to play a key role in the enforcement-related activities of the union. Organizers were generally tasked with monitoring compliance with the award or agreement in place at the workplace, receiving complaints, conducting any initial investigations, raising the issue with the employer at first instance, and resolving the complaint at the workplace level where possible. Complaints were only referred to the legal and industrial team where they could not be resolved at the workplace level. Only one union appeared to have fully embraced the organizing philosophy of completely freeing organizers from grievance work so “the organizer is able to focus upon growing the union and campaigning.”<sup>75</sup> In Union 4, any inquiries into existing rights and entitlements and suspected cases of noncompliance were immediately referred to a dedicated servicing/enforcement unit within the union. This approach, it was argued by the interviewees, was desirable not only because it freed up organizers to work on “building power and improving our levels of membership and leadership within various industries,”<sup>76</sup> but also as it led to greater professionalization, efficiencies and consistency in approach with respect to the enforcement-related work.<sup>77</sup> Our finding that (with the exception of Union 4) organizers continued to perform significant enforcement-related activities suggests that historical practices and models of unionism persist.<sup>78</sup> It is also consistent with other studies, which have found an ongoing dissonance between the theory of the organizing model and the realities of the work undertaken by organizers in Australian unions.<sup>79</sup>

Our case studies also revealed ways in which unions may leverage compliance-related activities so as to provide organizing opportunities. While our interviews found that most of the compliance-related work performed by the case-study unions was reactive (that is, based on and driven by complaints), four of the five unions also adopted more proactive and strategic approaches

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75 *Id.*

76 *Id.*

77 *Id.*; Interview with Elected Officer, Union 4, *supra* note 67.

78 It has been observed that, under the conventional “servicing” model of unionism in Australia, organizers undertook a large proportion of the enforcement-related work. Crosby observes that, until the ACTU instituted Organizing Works, only one union in the whole of Australia had organizers dedicated only to the organizing of new members. CROSBY, *supra* note 40, at 51.

79 David Peetz, Barbara Pocock and Chris Houghton found that in 2002-2003 organizers reported spending approximately thirty percent of their time on handling individual grievances of members. This was slightly lower than two years earlier (thirty-four percent of their time). Peetz, Pocock & Houghton, *supra* note 36, at 158-59.

to their monitoring and inspection activities. For three of the unions, these proactive approaches took the form of visiting and auditing specific groups of employers within the context of broader campaigns targeted at organizing specific workplaces, regions or sectors. These campaigns often initially took the form of organizers visiting a workplace, introducing themselves as being from the union and asking workers whether they had any concerns or problems in their workplace. As an organizer explained,

Sometimes if it's an individual who's a nonmember, and it's an area that we need to build or grow, and we haven't had a lot of involvement in, we can use that as a bit of a leverage in. So we'll assist that person and they go out and start telling people, "Well, look. They helped me. You should get on board."<sup>80</sup>

Our finding that unions may use their capacity to assist workers in identifying and pursuing cases of noncompliance with minimum employment standards as a means through which to "get a foot in the door" and gain access by a union to new workplaces, is consistent with similar findings made by Colling with respect to the use of the law by unions in the United Kingdom.<sup>81</sup>

Some interviewees also reported the tactical use of compliance-related issues to achieve bargaining objectives. One organizer explained:

So if you're getting ready to do an enterprise agreement, or you want to get an enterprise agreement in place for the first time with that employer, you'll find out what the issues are in the workplace. And if there's noncompliance issues, you'll utilize those to sort of motivate people on the ground to get involved, and to see what conditions they're missing out on, I suppose, what they're entitled to, and you'll turn it into an overall strategy to bargain to get a better outcome for them.<sup>82</sup>

For another interviewee, however, linking enforcement and bargaining objectives was fraught as it "muddied the waters" and there was the potential for noncompliance to be bargained away in the sense that the employer may offer to sign the enterprise agreement on the basis that the union not pursue redress for any former noncompliance.<sup>83</sup>

We further found that organizing objectives may influence the strategies used by unions to pursue suspected cases of noncompliance by an employer with minimum employment standards. Our interviewees revealed that unions

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80 Interview with Organizer, Union 1, *supra* note 71.

81 Colling, *supra* note 1, at 158.

82 Interview with Organizer, Union 1, *supra* note 71.

83 Interview with Industrial/Legal Officer, Union 4, *supra* note 65.

use a wide range of strategies to carry out their enforcement-related activities. These range from informal approaches based on direct negotiations with employers at the workplace to the formal use of the legal system. They include the provision of education and information to workers, direct negotiation with employers, public “naming and shaming” of non-cooperative employers, industrial action, and making use of other available leverage or pressure (such as industry associations or companies higher up in the supply chain). They also include the use of industrial or administrative tribunals and the initiation of court proceedings to recover underpayments and (in some cases) penalties against noncompliant employers.

Overall, however, most of the interviewees expressed a preference for settlement of disputes at the workplace level by a delegate or an organizer. There was also a preference for, where union strength or resources in the workplace enabled it, dealing with the dispute “on the ground” rather than through tribunal or court proceedings, as the latter was less effective in terms of organizing outcomes. This preference for settling grievances at the workplace-level persists despite evidence of extensive experience with, and use of, the tribunal and courts by the unions. It also persists despite a demonstrated willingness and preparedness by unions to use these formal avenues where necessary and regarded as of strategic value.<sup>84</sup>

### **B. Does Union Enforcement Activity Assist with Organizing and If So, How?**

Although our interviews revealed that unions used enforcement to leverage organizing and collective bargaining, the views among case-study unions with respect to the extent to which their roles in enforcing minimum employment standards offered organizing opportunities were mixed and complex. As outlined in Section I.C. above, Colling has drawn on legal mobilization theory to suggest that use of the law is more likely to achieve union objectives where it achieves *inspirational effects*, in the sense of confirming a sense of shared grievances or aspiration among workers and generating hope that change can be achieved; or *radiating effects*, in the sense of extending wins beyond the specific case to change behavior by employers and union members. Our case studies revealed considerable reluctance on the part of unions to embrace

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84 The finding that unions have a strong preference for pursuing noncompliance by employers through “informal” strategies is consistent with observations made by other scholars. See, e.g., WILLIAM B CREIGHTON, WILLIAM J FORD & RICHARD J MITCHELL, *LABOUR LAW: TEXT AND MATERIALS* 817 (2d ed. 1993); Lee, *supra* note 3, at 47.

enforcement as providing either of these two types of effects, while at the same time acknowledging that there were actual and potential benefits in doing so. As noted above, all the unions confirmed that access to legal services was a benefit of membership, and all promoted their legal services as such. For an organizer in Union 5, for example, the provision of legal advice and representation was a core function of unions that could not be displaced:

The ACTU has been pushing for about ten years now about this moving from being a servicing model union where you help fix members' problems to being an organizing union where you create structures to empower them to fix it themselves in the workplace, and that's great. My view is it can only go so far because you've got to give people something if you want their money. If they ring up and say "I've been underpaid," you can't just say "well, get everybody that you work with upset enough about it to fix it yourselves because we're not going to help."<sup>85</sup>

Another interviewee observed: "If we can't effectively enforce their rights, then people are going to question why the hell bother being in a union."<sup>86</sup> There was also a widespread recognition of the positive dynamic between a union demonstrating its effectiveness through assisting members in enforcing minimum employment standards, and membership growth.

However, there was a divergence in views and approaches between some unions that saw servicing as a key means through which to attract members, and others that saw enforcement as a small, useful but insufficient factor in organizing. For an elected officer in Union 1, for example, the union focused much of its compliance work on new workplaces, as "nine times out of ten we get a recruitment leap because people are not being paid correctly."<sup>87</sup> It was further explained that the union's enforcement work can "complement" organizing work, and that it was used "as a little bit of a recruitment or organizing strategy, I suppose."<sup>88</sup> In Union 2 as well, compliance-related issues appeared to be openly recognized as key elements in the union's recruitment of new members, and the union was promoted to a significant degree on its capacity to enforce the law and solve problems. An interviewee within this union explained that it was common practice to link cases of noncompliance by a specific employer with "an organizing strategy about why it's important

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85 Interview with Organizer, Union 5, in Sydney, Austl. (May 6, 2013).

86 Interview with Elected Officer, Union 1, *supra* note 66.

87 *Id.*

88 Interview with Organizer, Union 1, *supra* note 71.

for people to join the union, about what benefits are in it for them.”<sup>89</sup> It was further explained:

[I]t’s definitely part of our organizing strategy. So I mean we’ve sort of got a view as a union that we do a lot of work that other people might say is work for nonmembers in terms of compliance work, but our view is that unless you are seen to be relevant, and care, and active, in the most exploited group of workers there is, then your reputation as a union, and people’s likelihood of joining you and having confidence in you isn’t going to be there anyway.<sup>90</sup>

However, interviewees in other unions expressed unease over the proposition that the union would actively recruit on the basis of compliance-related issues. This was seen as carrying a number of risks. For an interviewee in Union 3, recruiting workers on the basis that their employer had failed or was failing to comply with minimum standards was not a sound organizing tool, leading only to “six month members.”<sup>91</sup> Another interviewee in Union 4 expressed unease with the notion that the union would rely on instances of employer noncompliance with minimum standards to organize workers:

I think . . . sometimes we’re getting into a situation where we’re almost recruiting around the issue. So you might go into a workplace and say, “Look there seems to be an issue here. There’s a member here who has sort of told us about it but all of you guys aren’t members . . . . If you join the union then we need to talk about whether we can sort of take this further or whatever.” And you see what I mean about it being a challenge and something we’re grappling with, like it’s quite fraught. I mean you know unions generally don’t want to recruit simply around an enforcement issue, or at least that’s not our philosophy. I mean we want people to join our union because they want to build power in their industry and improve standards.<sup>92</sup>

This interviewee further argued that the union preferred to sign people up for other reasons, not least because “the reality is that . . . entitlement enforcement is a messy process, and no-one comes out of it one hundred percent happy.”<sup>93</sup>

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89 Interview with Industrial/Legal Officer, Union 2, *supra* note 70.

90 Interview with Elected Officer, Union 2, *supra* note 69.

91 Interview with Industrial/Legal Officer, Union 3, *supra* note 68.

92 Interview with Elected Officer, Union 4, *supra* note 67.

93 Interview with Industrial/Legal Officer, Union 4, *supra* note 65.

In expressing reservations over the proposition that unions should recruit members on the basis of their capacity to provide services,<sup>94</sup> a number of interviewees emphasized the dissonance between the pursuit of individual rights and the collectivist nature of trade unions. One interviewee stressed: “It’s just not what we’re about. We’re not a clearinghouse. We’re not an insurance company. . . . [I]t doesn’t build long-term power.”<sup>95</sup> Another emphasized: “We’re an organization that you need to join not because you have a problem but because you want the benefits of being a member, and one of the benefits is if you do have a problem we can help you.”<sup>96</sup>

The view that unions were more than just service-delivery organizations also emerged strongly when interviewees expressed their views on the Australian state labor inspectorate (the FWO). While it was generally conceded that the labor inspectorate had a role to play, the organization was not regarded by interviewees as giving workers “the sense of involvement with their workmates,” the “sense of collectivism,” or the empowerment regarded as necessary to achieve long-term sustainable change within workplaces.<sup>97</sup>

There was, however, evidence that enforcement-related issues were widely used strategically by unions as a “catalyst” for fostering collective identities and action. While all the case-study unions explained that they had a general policy of not assisting nonmembers, they all conceded that such policies were waived in certain circumstances, which included where cases of noncompliance affecting nonmembers presented organizing opportunities. One interviewee likened noncompliance by employers to “fuel”: “It can be easy to organize workers when they’re a bit angry, you know, and so these kind of issues tend to make workers angry and tend to make them want to do something about it, and gives them impetus to join the union movement.”<sup>98</sup> Another observed that noncompliance issues may be used “to build strength, so that once people realize that there’s issues, and some of them can be simple to fix, some hard, some simple, it gives them confidence to deal with some of the broader, more difficult issues.”<sup>99</sup> An interviewee in one union explained that the union was currently engaged in a process of considering how to best

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94 This finding echoes similar findings made in the United Kingdom. *See, e.g.,* Colling, *supra* note 1, at 151-52.

95 Interview with Elected Officer, Union 4, *supra* note 67.

96 Interview with Industrial/Legal Officer, Union 5, in Melbourne, Aust. (Apr. 22, 2013).

97 Interview with Organizer, Union 1, *supra* note 71; Interview with Industrial/Legal Officer, Union 4, *supra* note 65.

98 Interview with Industrial/Legal Officer, Union 4, *supra* note 65.

99 Interview with Organizer, Union 1, *supra* note 71.

leverage the significant volume of enforcement work it carried out in order to complement the campaigning work undertaken by the union.

The use of compliance-related activity to, in a sense, *indirectly* organize workers through helping build worker activism and foster a collective identity would appear to echo findings made by other scholars with respect to “legal mobilization” by trade unions in other jurisdictions. In particular, as noted above, it would appear to be consistent with Colling’s suggestion that unions are more willing to use individual statutory law where it can be leveraged to achieve *inspirational effects*. Nevertheless, the reluctance of the unions we studied to embrace enforcement action as an effective organizing tool and the lack of any overarching strategy regarding the use of litigation suggests that these inspirational effects will be on a case-by-case basis. Colling concluded from his case studies of two British unions that while the unions make extensive and sophisticated use of the law, persistent and widespread skepticism concerning the potential of law to achieve union objectives means that legal mobilization by U.K. unions will “likely remain contingent and incomplete.”<sup>100</sup> There appears to be a similar skepticism among the unions we studied, suggesting that legal mobilization in Australia is also likely to be fragmented.

Moreover, there seemed little indication that enforcement was being used to achieve *radiating effects*. According to Colling, this is achieved where actual or threatened litigation is used to encourage employers to accommodate union objectives, but also to “encourage members to mobilize behind issues, to support the objectives of litigation through broader means including campaigning and possibly industrial action.”<sup>101</sup> This is more common in the United States, where the combination of fee incentives, the availability of class actions, and the existence of large employers with labor cost-cutting strategies has led to a number of high-profile class actions, often brought by unions.<sup>102</sup> However, in smaller jurisdictions such as Australia, there are fewer incentives for large employment standards enforcement actions. Although there is evidence that trade unions in Australia have been making increasing use of the class action, this has mostly been as a strategic lever in major industrial disputes.<sup>103</sup> Litigation does not seem to have been planned or used as an express campaign strategy to support wider organizing and profile-raising efforts.

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100 Colling, *supra* note 11, at 27.

101 *Id.* at 21.

102 Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of s 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317 (2008).

103 Jane Caruana & Vince Morabito, *Australian Unions — The Unknown Class Protagonists*, 30 CIVIL JUST. Q. 382 (2011).

## CONCLUSION

Legal frameworks in Australia have long recognized the significant role that trade unions can and do play in the monitoring and enforcement of minimum employment standards. While this recognition continues to be embodied in statute today, it is done so in a manner that is increasingly individualistic and legalistic in nature. However, at the same time that legislative frameworks are increasingly channeling unions *towards* service-related roles, the Australian union movement has sought to revitalize and grow through the adoption of structures and approaches which shift attention and resources *away* from servicing of individual compliance-related issues towards organizing and member activism. This Article has explored these somewhat opposing trends and dynamics, and the ways in which they manifest themselves within the context of the everyday compliance activity of trade unions.

Our research has found that trade unions in Australia spend a significant amount of their time monitoring and enforcing employer compliance with minimum employment standards, and that they continue to regard the protection of members' minimum employment standards under law as an integral part of what they do. Indeed, for some unions, this concern with protecting workers' minimum employment standards extends well beyond their membership. Our research also demonstrates, however, that the way in which this work is undertaken within unions, and by whom, has changed significantly in recent decades, and that these changes reflect, and have been driven by, a number of factors including changes to legislative frameworks and union strategy.

Consistent with findings in earlier studies on Australian union renewal, we found that there is considerable dissonance between theoretical models of organizing unionism and the realities of everyday compliance-related activities within many Australian unions. In particular, we found that in four out of the five unions, organizers were still expected to perform a wide range of enforcement-related tasks. While this may be explained by a number of factors (such as resource constraints and leadership), it may also be that the compliance-related roles assigned to unions under legislative frameworks — roles hard fought for and won — have in fact impeded the shift within Australian unions towards an organizing model of unionism.

While there is considerable diversity among unions as to the extent to which they focus on compliance-related work and how they go about this work, all the case-study unions emphasized that access to these services is a key benefit of union membership and that the quality of the services provided in this area has an immediate bearing on membership through increasing or decreasing member satisfaction with the union. The relationship between the provision of compliance-related services and attracting *new members*, however, is less

clear. Our case studies revealed a diversity of views within unions as to the extent to which compliance-related activity is perceived as a legitimate and effective means of attracting new members. While it is impossible to say with certainty what determines this divergence in approach, it would appear to be influenced to a significant degree by perceived levels of noncompliance in the industry, the nature of union memberships, and the strategic approach adopted by the union.

Overall, however, and despite the significant proportion of time and resources spent by unions on enforcement-related activities, our research has found little evidence to suggest that the Australian union movement is moving towards, or willing to embrace, a model of unionism that emphasizes the representation and servicing of individual workers over other union functions, despite legislative nudges in this direction. Most interviewees were keen to emphasize the fundamental differences between a union and other entities that may perform similar enforcement-related activities on behalf of workers, such as law firms or the state inspectorate. There was a clear reluctance among most interviewees to be seen as adopting a servicing approach, and a skepticism that such work — individualistic and legalistic in nature — could help build the collectivist values seen as necessary for successful union organization. We therefore found little evidence that those within the unions studied believed greater engagement with legal mobilization has the potential to contribute significantly to union renewal.

In describing the compliance-related work undertaken by his union, one interviewee stressed that enforcing minimum standards was “a core part of what unions are about.” Later in the same interview, though, the same interviewee explained to us that enforcing minimum standards was “just not what we’re about.”<sup>104</sup> To us, the use of these two phrases by the same interviewee embodies some of the ambiguities and tensions inherent in a situation in which trade unions are pursuing growth strategies focused on building workplace activism and collective strength, within the confines of legislative and institutional structures which increasingly encourage and foster their roles as legal advisors and advocates for individual workers. So the question remains: Can it be both? The answer — at least in Australia — would appear to be yes, it can.

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104 Interview with Industrial/Legal Officer, Union 4, *supra* note 65.

